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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN WES FARRISH, Defendant and Appellant.	A129772 (Contra Costa County Super. Ct. No. 05-081381-6)

Appellant Steven Wes Farrish was convicted by jury of the murder of Tiyani Cole (Pen. Code, § 187, subd. (a); count 1)[1] and attempted murder of Dashawn Smith (§§ 187, subd. (a), 664; count 2). The jury further found that Steven had personally and intentionally discharged a firearm, causing the death of Tiyani. (§ 12022.53, subds. (b), (c) & (d).) Steven was sentenced to 77 years to life in state prison. On appeal, Steven argues: (1) the trial court failed to conduct proper inquiry into purported juror misconduct; (2) the prosecutor engaged in misconduct in arguing the case to the jury; (3) the trial court failed to instruct the jury regarding when consciousness of guilt can be inferred from third party efforts to suppress evidence; (4) the trial court misinstructed the jury regarding character evidence; (5) the trial court failed to give a unanimity instruction

[1] Unless otherwise noted, all further statutory references are to the Penal Code. Because the victim and his twin brother, Tavani Cole, share the same last name, we will refer to each by their first names. For the same reason, we will refer to appellant, Steven Farrish, and his brother, Joe Farrish, by their first names. No disrespect is intended.

with respect to count 1; and (6) the trial court failed to adequately respond to a jury question regarding the definition of a "kill zone." We affirm.

I. BACKGROUND

Prosecution Case

On May 12, 2008, shortly before 1:00 p.m., police officers were dispatched to the intersection of Shane and Gilma Drives, in the Hilltop neighborhood of Richmond, to investigate reports of a shooting.[2] After interviewing people in the neighborhood, officers discovered Tiyani's body in the side yard of a house at 2993 Gilma. It appeared that Tiyani, who was known as "Slim," had been shot in the back. The officers closed off the neighborhood and continued to investigate.

Tiyani's mother, Cassandra McElveen, arrived shortly after the shooting. As McElveen was speaking to a police officer, she saw a car drive by with Smith in the front passenger seat. McElveen knew that Smith had been with Tiyani earlier in the day, so she alerted Sergeant Mitchell Peixoto, who stopped the car and spoke to Smith. Smith told Peixoto that he had been walking with Tiyani near Shane and Groom when Steven, known as "White Boy Steve," drove up in a black vehicle. Steven stopped the car and "bounced out and started shooting at us." Smith said he and Tiyani took off running, ran together for a while, and then split up.

When Smith learned that Tiyani had been killed, he broke down crying and fell to the ground. McElveen went over to comfort Smith. She confirmed Tiyani was dead. Smith told her: " 'I'm sorry, we tried to run [from] White Boy Steve. He was shooting at us. I thought [Tiyani] got away.' " Smith told Peixoto that he could pick the shooter out of a photo lineup. The officer handcuffed Smith and placed him in the back of a patrol car so onlookers would not think Smith was "snitching."

Smith was subpoenaed by the prosecution to testify at the trial, but he was an obviously reluctant witness and he claimed ignorance of important details of the

[2] There were several calls to 911 regarding shots fired. The first call was received at 12:52 p.m. and reported that a Black male was shooting from a black car.

shooting. In brief, Smith acknowledged at trial that he had grown up in the Hilltop neighborhood with both Tiyani and Steven. Smith had been with Tiyani at the time leading up to and during the shooting and had heard gunfire, but he denied seeing the shooter. Smith also denied identifying the shooter. Smith testified that he ran down Groom with Tiyani but they got separated at the intersection with Shane. Smith went left on Shane while Tiyani went straight across it. Smith lost sight of Tiyani at this time because there was a bus in between them. Smith testified that neither he, nor Tiyani, had a gun at the time of the shooting. Although he said no one had threatened him, Smith also indicated some worry about his family's safety. Smith admitted prior convictions for a theft-related offense and physical assault.

The prosecution played Smith's interview, recorded on video at the police station on the day of the shooting.[3] During the interview, Smith said that he and Tiyani had spent the morning together, and that they had seen Steven at a local McDonald's restaurant. Later, as Smith and Tiyani were walking in the Hilltop neighborhood, they heard a car approach with its radio blaring. As the car came closer, Smith could see Steven in the driver's seat and another man in the front passenger seat. The car was a black Pontiac Bonneville.[4] Steven stopped the car and got out, immediately firing four or five gunshots at Smith and Tiyani. When asked what kind of gun Steven had, Smith said: "I don't know. I think it was a Glock." Smith and Tiyani ran together for about a block, then separated. Smith hopped a fence and hid in a back yard on Gilma. A short time later, he heard three to five more gunshots nearby. Smith ran to a friend's house and

[3] The jury was instructed that the interview was played at trial for two purposes. "One is for any inconsistencies with [Smith's] testimony here in court . . . and also for any observations of his demeanor while he was doing the interview. It is for [the jury] to determine what those things mean." The jury was later instructed that it could consider a witness's prior statements for their truth.

[4] A Richmond police officer testified that he had seen Steven driving a black Pontiac with chrome wheels 30 or more times in the months leading up to May 2008.

called his girlfriend. Smith's girlfriend picked him up and drove him through the Hilltop neighborhood, where he was stopped by the police.

During the police interview, Smith also said that Tiyani did not have a gun with him at the time of the shooting. Smith added that Tiyani had sometimes carried a gun in the past, but had stopped. Tiyani also had carried a .45-caliber bullet as a type of good luck charm. At the conclusion of the interview, Smith identified Steven as the shooter from a photo lineup. Smith was asked why Steven might have shot them. Smith told the officer: "[Steven's] brother, Joseph . . . , killed someone, and that he was in prison or in jail. [¶] And he said that [Steven] thought that [Tiyani] was a snitch . . . [¶] . . . [¶] . . . so [Steven] killed him."[5]

Patricia Neal testified that, on May 12, 2008, shortly before 1:00 p.m., she had been driving a bus on Shane. Neal stopped at a bus stop near the intersection of Shane and Groom and saw two young Black men sprinting in her direction. One of the men was wearing a blue shirt, and the other was wearing a brown shirt tinged with orange.[6] Neither man appeared injured or disabled in any way. In fact, Neal thought the man in brown and orange was running like a "track team star," with his hands high in the air and his legs "kick[ing] high." She did not see a gun in his hands. The man in the blue shirt appeared to be carrying some type of bundle, which may have been a "brick" of narcotics wrapped in Saran wrap. The bundle was "definitely" not a gun.

As the two young men approached Neal's bus, the man in blue yelled, "Split up." The men ran past the bus on its opposite sides. She watched the men in her mirrors, then looked ahead and saw "a black Buick Century" driving towards her. The car was weaving across the road. The car passed Neal's bus and stopped. Neal ran to the back of the bus because she was afraid the driver of the car might enter the bus through its front door, and she thought that several school-aged children might need help out the rear door

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[5] The jury was instructed that this evidence was admitted "not for the truth of the information that was given."

[6] Tiyani was wearing an orange and brown jacket.

of the bus. Neal could not see the occupants of the car because its windows were tinted, but she saw the driver's side window come down and a "big gun [with] a long barrel" poked outside. The car then "took off" down Gilma. Moments later, Neal heard gunshots. Neal drove out of the neighborhood, but gave a statement to the police later that afternoon.

Sherman Jackson testified that, on May 12, 2008, around 12:50 p.m., he left his house on Gilma to pick up his father. As he got into his car, Jackson heard gunshots in the distance. After he started his car, he saw two young Black men running around the corner from Shane. The men ran toward Jackson for a few moments, then split up and ran in different directions on Gilma. One man ran close to Jackson's car and then disappeared between two houses, while the other ran on the other side of the street toward the house at 2993 Gilma. Jackson did not see anything in the hands or arms of either man.

Jackson drove forward and saw a dark vehicle driving quickly around the corner. The vehicle stopped in the middle of the street near 2993 Gilma, about 15 to 20 yards ahead of Jackson's car. Jackson heard gunshots and saw smoke coming from the car's front passenger window. The car sped away. Jackson stopped and reported what he had seen to the police.

Police Investigation

The police officers examining the crime scene found no guns anywhere near Tiyani's body or along the route he and Smith had reportedly run. The officers also did not observe any blood in the area, other than a pool of blood immediately beneath Tiyani's body. Near the corner of Shane and Groom, police officers found one spent nine-millimeter casing and an unfired .45-caliber cartridge. The nine-millimeter casing was found midblock on Groom and the .45-caliber cartridge was found approximately 77 feet away.

There were five bullet impact points in a wooden fence separating the west side yard of 2993 Gilma from its front yard. A bullet fragment was found in the side yard next to a garbage can. There were also a few bullet fragments in the front yard of the

house, and bullet holes and strike marks on or near the front porch. Probes inserted into the bullet holes in the fence indicated that the gunshots had most likely been fired by a person positioned in or near the street at the front of the house. A forensic specialist with the Richmond Police Department believed all of the rounds were fired from a position three to five feet above the ground. The evidence was not inconsistent with the shooter having fired from a moving car. All of the bullets and holes were consistent with medium caliber ammunition, such as a nine-millimeter, and inconsistent with .45-caliber ammunition.

Records from Sprint Nextel Telecommunications showed that several phone calls had been made and received around the time of the shooting on a cell phone registered to Joe and used by Steven. The first call was received by the phone at 12:52:01, and was transmitted, in part, from the Hilltop Mall cell phone tower, 0.2 miles from the scene of the shooting.[7] That call was followed by multiple short calls, both inbound and outbound, using the same tower over the next few minutes.

Police officers searched Steven's residence on the evening of the shooting. In Steven's bedroom, officers found: (1) eight .40-caliber bullets and one nine-millimeter bullet; (2) a certificate of title and an insurance card for a 1997 Pontiac Bonneville registered in Steven's name; and (3) a letter written to Steven by his brother, Joe. The

[7] The Sprint Nextel custodian of records testified that cell phones "typically" use the cell tower they are physically closest to. However, he also testified: "If I'm standing right next to a cell phone tower, but there's a building impeding on the signal to that cell phone tower, my phone may elect to connect to another cell phone tower. [¶] Another issue would be the population a cell phone tower is fielding at a specific time. If there's a high amount of volumes the cell phone tower is fielding the less strength it's going to emit. [¶] And also, just the overall strength of a cell phone tower, regardless of the population. Some cell phone towers are stronger than others and emit stronger signals. [¶] . . . [¶] [P]roximity is [the] number one indicator as to what cell phone tower is going to be used."

letter stated in part: "I want you to be cool out there. Don't do nothin' stupid. And watch out for them sucka's, especially that nigga Slim."[8]

On May 13, 2008, at 12:30 a.m., Steven was arrested, in Vallejo. Steven's hands and clothing were tested for gunshot residue.[9] A criminalist, who testified as an expert in gunshot residue, found particles of gunshot residue on Steven's shorts. She testified: "It means that you may have discharged a firearm or you may have been in the vicinity of the firearm being discharged or somehow come in contact with gunshot residue from the discharge of the firearm." There were no traces of gunshot residue on the swab taken from Steven's hands, but the criminalist explained that such residue can easily be removed through washing or everyday contact with other surfaces.

Dr. Arnold Josselson testified as an expert in forensic pathology. He performed Tiyani's autopsy. Dr. Josselson observed two gunshot wounds—a fatal wound to the chest and a nonfatal wound to the back. One bullet had entered the right side of Tiyani's chest and pierced both lungs and the heart before exiting through the upper left back. The other bullet superficially crossed Tiyani's back from the lower left to the lower right. Dr. Josselson could not determine the order the shots had been fired or the precise positioning of Tiyani or the shooter. He could tell that Tiyani was not facing the muzzle of the gun at the time of either shot. There was no soot or stippling on Tiyani's clothing or on either wound, so Dr. Josselson believed the shots had not been fired from within two or three feet.

On cross and redirect examination, Dr. Josselson said that most people would collapse immediately or within a few moments of being shot in the lungs and heart, but that death would not necessarily be instantaneous. Dr. Josselson believed Tiyani had lived several minutes after being shot because there was a fair amount of blood in his

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[8] The jury was instructed by the trial judge: "I'm allowing the contents of this letter to be introduced into evidence not for the truth of the contents, but for the effect on the reader."

[9] Neither Smith nor Tiyani was tested for gunshot residue.

chest. Dr. Josselson also said that a person with wounds like Tiyani's could possibly engage in purposeful activity for up to five minutes and even run a short distance—50 to 100 feet, or several hundred feet on "rare occasions"—but that most people would collapse "right away."[10] It was possible, but unlikely, that the bullet causing the fatal wound had passed through the wooden fence before striking Tiyani.

Animosity Between the Parties

Tiyani's twin brother, Tavani, testified that he and Tiyani knew Steven and Joe because they attended the same junior high and high school. One day, in March 2005, Tiyani told Tavani, Joe, and Pierre Hudson that a man named Rashad Narcisse had paid someone to beat him up. Tavani, Hudson, and Joe drove to Narcisse's house. Joe had a gun. Joe got out of the car at Narcisse's house and Hudson and Tavani drove away. Joe later called Tavani and said he had killed Narcisse. Joe, Hudson, and Tavani were eventually arrested. Tavani and Hudson pled guilty to accessory to manslaughter in exchange for three-year prison sentences. Tavani agreed to testify at Joe's trial, but Joe ultimately pled guilty before trial.

On February 15, 2008, Tiyani called Tavani at work. Tiyani told Tavani that Steven had "just tried to kill him [by shooting] up" a rental car he had been driving. Tavani also testified that he had received threats about being a witness at this trial. The gist of the threats was that Tavani and "Sean" were "snitchin' on Steven" and "would be killed."[11] Tavani acknowledged that Steven had never personally threatened him.

McElveen testified that she had raised her sons, Tiyani and Tavani, in the Hilltop neighborhood of Richmond. In 2005, Tavani, Joe, and Hudson were charged with killing Narcisse. Tavani ultimately pled guilty to a lesser charge, with a condition that he would testify at Joe's trial. McElveen testified that, during court proceedings relating to the

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[10] The distance between the location of the initial shooting on Groom and Tiyani's body on Gilma was estimated as approximately 200 feet.

[11] This testimony was admitted solely to show Tavani's "attitude towards testifying and coming to court."

2005 killing, friends of Joe's family, including Steven and a man known as Dominic, called Tiyani a "snitch" and "were trying to jump him."[12] Later, Dominic told McElveen: "that's what [your] son get, [he] is six feet under and your ass is going to be six feet under also." Dominic was sitting in the courtroom as McElveen testified. McElveen also testified that, as Steven's trial date approached, Smith told her he was afraid to testify. Smith said that a police report reflecting his cooperation with the investigation had been circulating in the community.[13]

Razalyn Nickola testified that she had dated Tiyani in early 2008. On February 15, 2008, Nickola's car was at a repair shop, so she rented a Mustang to get to work. Nickola and Tiyani drove the Mustang to Nickola's office, and she let Tiyani drive the car the rest of the day. Later that day, Tiyani called Nickola at work and said that the Mustang "just got shot up." Tiyani eventually told her that Steven had shot at the Mustang. Nickola called the police and said the Mustang had been stolen because she did not want to get in trouble or be liable for the damage to the car. After the car was located, Nickola called the police and told the truth, explaining that she had loaned the Mustang to Tiyani, and that Steven had shot at it while it was in Tiyani's possession.

Richmond Police Officer Joseph Schlemmer testified that, on February 15, 2008, he had responded to a report of a "stolen car found" in the Hilltop neighborhood. Schlemmer located the gray Ford Mustang reported stolen by Nickola and saw three bullet holes in the driver's side of the car.

Defense Case

Firearms expert Jacobus Swanepoel testified that he had examined the unfired .45-caliber cartridge that had been recovered near the corner of Shane and Groom. The

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[12] The jury was instructed: "I'm allowing [the testimony] merely to show that there was animosity amongst the parties, not for the truth of what words they exchanged between them, but merely that there was animosity between these individuals."

[13] The jury was instructed: "I will allow the answer, not for the truth of what [Smith] told this witness, but merely as evidence of [Smith's] state of mind and his attitude towards testifying."

surface of the cartridge had extraction markings suggesting the cartridge had been cycled through a firearm, possibly when a gun had misfired or if a person had pulled the slide of the gun to eject and reload in preparation for firing. Swanepoel could not tell when the cycling occurred.

Albert Broadway testified that, in 2008, he was living with his godmother, Angel Montgomery, on Groom. Broadway said he spent the morning of May 12, 2008, with Steven. They drove in Steven's car, a black Pontiac Bonneville, to the DMV and a "gold tooth shop." After noon, they started to drive back to Montgomery's house. When they reached the corner of Shane and Groom, Steven stopped at a stop sign. Tiyani and Smith were standing in front of some apartments near the corner, and as they stepped off the curb Smith displayed a gun. Broadway crouched in the footwell of the Pontiac because he thought Smith "was going to kill [him]." Broadway heard gunshots, but he was not sure who was firing. At some point Steven's door opened, but Broadway did not know if Steven got out of the car. Steven eventually sped away, and Broadway remained crouched in the footwell until they arrived at Montgomery's home.

On cross-examination, the prosecutor repeatedly pressed Broadway for details about the shooting. Broadway insisted he could only remember hearing gunshots as he crouched in the footwell of the Bonneville. Broadway did not see Steven with a gun or get out of the car. And Broadway did not know if the car made any turns before dropping him off. At the conclusion of cross-examination, Broadway acknowledged he had not described his version of events to anyone until he talked to a defense investigator about six months before trial—about a year and a half after the shooting.

Montgomery testified that, in 2008, she lived at 3160 Groom. On the morning of May 12, 2008, she saw Broadway with Steven. Later that day, around 1:00 p.m., Broadway came to Montgomery's house looking shaken up. Broadway told Montgomery that "somebody was trying to kill him."[14]

[14] The statement was admitted only to show Broadway's state of mind, not for the truth of the underlying statement.

Montgomery also testified that, on February 12, 2008, someone had fired shots at her house from a passing car. Steven and Akilah, Montgomery's daughter, were sitting in front of the house when the car drove by with two men inside.[15] Montgomery identified Tiyani as the driver of the vehicle from which the shots were fired. Montgomery did not report the shooting to the police, but she believed a neighbor did.

Victoria Cook testified that she had met Tiyani through her former boyfriend, Dominique Cole. On two occasions in 2008, Cook had been with Tiyani when he said he wanted to kill Steven. On cross-examination, Cook said she had never told the police about Tiyani's statements. Cook told a defense investigator about the incidents, in July or September 2009, after Dominique Cole had befriended Steven in jail.

Dr. Louay Toma testified that, on December 27, 2005, he had treated Steven for a gunshot wound. The defense also submitted evidence of Tiyani's 2007 conviction for possession of a concealed weapon by a person previously convicted of the same crime. The parties also agreed to a lengthy stipulation about a police officer's search of Tiyani's car in February 2006. The officer discovered a Colt .45 semiautomatic handgun in the car. Tiyani told the officer that he carried the gun because "people [were] looking for him" to retaliate for a murder involving his brother. The defense also submitted certified copies of Smith's convictions for receiving stolen property, in August 2007, and transportation or sale of marijuana, in August 2008.

Rebuttal Evidence

Nathan Behrmann, a deputy sheriff, testified that, in February 2009, he took photographs of Steven's tattoos. One photo showed a full-sized semiautomatic handgun tattooed on Steven's hip. Another photo showed tattoos of eight shell casings on the back of Steven's right hand. "I get off" was tattooed above the casings.

Joshua Atkinson testified that, in 2006, he had been a senior in high school. On the night of September 30, 2006, Atkinson and some friends encountered another student, Eddie Banuellos, at a Taco Bell in Martinez. Atkinson accused Banuellos of stealing

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[15] Akilah was Steven's girlfriend.

property from his school locker, and the two young men argued. Later that night, when Atkinson and his friends were at a party, Atkinson received a phone call from a man who identified himself as Banuellos's older brother. The caller warned Atkinson not to talk to Banuellos. About 15 to 20 minutes later, when Atkinson and his friends were standing on the street outside the party, a car pulled up and four men got out. The four men approached Atkinson and his friends. One of the men was Steven, who swore at Atkinson. Atkinson protested. Steven pulled a gun from his waistband and placed it against Atkinson's forehead. Steven said something like, "Just give me a reason . . . to kill you." One of the men with Steven went through Atkinson's pockets and took his money, keys, and cell phone.[16]

Richmond Police Detective Michael Rood testified that there was no report of any shooting on Groom on February 15, 2008.

Verdict

The jury convicted Steven of one count of first degree murder and one count of attempted murder. The jury also found the firearm enhancements true. The trial court sentenced Steven to serve a term of 77 years to life in state prison. Steven filed a timely notice of appeal.

II. DISCUSSION

On appeal, Steven argues: (1) the trial court failed to conduct proper inquiry into purported juror misconduct; (2) the prosecutor engaged in misconduct in arguing the case to the jury; (3) the trial court failed to instruct the jury regarding when consciousness of guilt can be inferred from third party efforts to suppress evidence; (4) the trial court misinstructed the jury regarding character evidence; (5) the trial court failed to give a

[16] Atkinson's testimony was corroborated by two of his friends. Before Atkinson and his friends testified, the trial court instructed the jury: "[T]his next witness, his testimony is for limited purposes. And I will give you instructions tomorrow about how you can consider this testimony for those limited purposes. But please understand that his testimony is for just limited purposes, and I'll give you further instructions about that."

unanimity instruction with respect to count 1; and (6) the trial court failed to adequately respond to a jury question regarding the definition of a "kill zone." None of Steven's claims necessitate reversal.

A. *Juror Misconduct*

Steven first argues that the trial court abused its discretion, and violated his Sixth and Fourteenth Amendment rights, when it failed to conduct adequate inquiry into a report of juror misconduct. We disagree.

A criminal defendant has a fundamental constitutional right to a fair trial by an impartial jury. (See U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; *Duncan v. Louisiana* (1968) 391 U.S. 145, 149; *People v. Collins* (1976) 17 Cal.3d 687, 692–693, superseded by statute on other grounds, as stated in *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19.) Section 1089 provides, in pertinent part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box . . . ." But, " '[a] juror's inability to perform his or her functions . . . must appear in the record as a "demonstrable reality" and bias may not be presumed.' [Citations.] . . . Moreover, under . . . section 1089, which allows a trial court to remove a juror on a finding of good cause, 'The determination of "good cause" in this context is one calling for the exercise of the court's discretion; and if there is any substantial evidence supporting that decision, it will be upheld on appeal.' [Citation.]" (*People v. Beeler* (1995) 9 Cal.4th 953, 975.) "Once the court is alerted to the possibility that a juror cannot properly perform his duty to render an impartial and unbiased verdict, it is obligated to make reasonable inquiry into the factual explanation for that possibility." (*People v. McNeal* (1979) 90 Cal.App.3d 830, 838.) "[W]hen there is a claim of juror misconduct, the court must conduct 'an inquiry sufficient to determine the facts . . . whenever the court is put on notice that good cause to discharge a juror may exist.'

[Citation.]" (*People v. Pinholster* (1992) 1 Cal.4th 865, 928, disapproved on other grounds by *People v. Williams* (2010) 49 Cal.4th 405, 458–459.)

1. *Background*

Jury voir dire began on February 26, 2010. Before the venire panel was brought into the courtroom that morning, Steven's mother advised the court that she had overheard a potential juror using the word "guilty." Juror No. 106 was questioned privately by the trial judge and said that she "was talking about an [arbitration] issue [she] had at work . . . [¶] . . . [¶] . . . where [her] employee is guilty." After this questioning, the prosecutor said: "I have run into this situation before where people interested in the case periodically report snippets of conversations that they hear in the hallway. Inevitably, this is what happens. And, quite frankly, I think it alienates the jurors. [¶] . . . I would request that if there's going to be any more reporting that we go into detail questioning regarding the reporter, because nine times out of ten there is widely divergent stories regarding this issue." The trial court responded: "The Court has certain obligations. I will follow up with those obligations as I see fit." Juror No. 106 was dismissed from jury service without explanation.

After the entire venire panel was brought into the courtroom, the indictment was read. Before the next break, the trial court instructed the jury as follows: "You may not research this case on the Internet or anywhere else. It is extraordinarily important that you not discuss this case, even the nature of the charges, or anything that you have discovered, what little you have discovered, about it just through the process of the questionnaire or our discussions, with anyone, amongst yourselves, with anyone else, because we'll start this whole process all over again, and you can see already how much time it has taken just to get this far." Later, the trial court informed the jury: "There may be some self-defense issues in this case. I will instruct you on what the law is . . . ."

After a jury had been selected, but before opening statements, the trial court made the following record outside the presence of the jurors:

"I have received in my in-basket in chambers a[n] envelope addressed to me, allegedly, by an anonymous juror. I say 'allegedly' because there is no proof that it's

from a real juror. I am very concerned about how it got there, since absolutely no one on my staff, or anyone who has access to my office, says they had contact with any juror, nor with the letter. So I'm very concerned about how it got there. And we are investigating.

"The envelope that it came in and the actual letter, the security staff is considering having it fingerprinted because there is no way for it to have gotten there legitimately. And it came during a very narrow window of time on Thursday afternoon.

"I'm making the letter a part of the record. And it alleges that . . . one of our jury was apparently telling a lady friend about something having to do with the case, *although they don't know anything about the case*, since we have only gone through jury selection—and was opinionated about how bad the court system has been managed. I don't know what that means, since the letter doesn't say.

"The letter is dated March 10th, which is interesting, since today is March the 8th, and the letter was received on March the 4th. [¶] The grammar is poor in the letter. . . . [T]he date of the letter is a different font than the actual letter itself. [¶] I don't give the letter much credence because of all the above facts, and because of the way it was delivered. I will note for the record that I have told this jury a number of times that if they have any questions about anything, those questions should be directed to . . . my bailiff or any of my staff, all of whom have made themselves available. And whoever delivered this did not avail themselves of that, which also makes me suspicious of the validity of this, and that it actually came from a juror.

"What I will do is speak with . . . the one juror that is named here, and that's the other thing that is puzzling about this. It names the juror by both first and last names, misspelling the name. The only time our jurors were named out loud by both first and last names [was] when my clerk read off those names when they were seated, and that is the only time. And it's not a common name. So in order for someone to remember that name, they would have had to have a pretty extraordinary memory, or had been writing the names down, because our jurors don't have notebooks at this point. So that's a little unusual . . . .

"So what I'm going to do is inquire of that juror . . . named in the letter individually, briefly, when they come in at 1:30, and then move on, depending on what he has to say.

"But as I said, because of the content of the letter, as well as the manner in which I received it, I'm not putting a whole lot of credence in it. I am very concerned about how I received it and how it managed to make it all the way into my in-basket in my private chambers without anyone who validly has access to my chambers having any knowledge of it, or having any contact with any of our jurors during that very small window of time when it appeared there." (Italics added.) The letter was added to the record.

That same day, the trial court individually questioned Juror No. 42, who had been seated as the 10th member of the jury. The following colloquy occurred on the record:

"THE COURT: I just have a quick question for you. Something has come up and I needed to inquire into it.

"JUROR NUMBER 42: Sure.

"THE COURT: I've received some information. I need to follow up on it to see whether or not there is anything to it.

"JUROR NUMBER 42: Okay.

"THE COURT: The information was that you were having a conversation during a lunch last Tuesday discussing the court process, and it was with a female friend.

"JUROR NUMBER 42: My wife.

"THE COURT: Your wife?

"JUROR NUMBER 42: Yes. I was at lunch, and I—just the process in general. Nothing specific about the case.

"THE COURT: Okay. Okay.

"JUROR NUMBER 42: She comes every day with me to the court.

"THE COURT: Okay. Can you just tell me a little bit about what the conversation entailed?

"JUROR NUMBER 42: Usually, just about the jury selection process, because that's what I was involved with. You know, about how some people had been there a

week in the main 12, and then all of a sudden they got kicked out. So it was kind of interesting, you know, that they would be in the 12 and then out of the 12, so I mentioned that.

"THE COURT: Okay.

"JUROR NUMBER 42: I don't—you know, a few other things about what people do. I mean, you know, one guy works as a math teacher at St. Mary's here. My wife went to St. Mary's in Minnesota. And she even had an application to come here. So it's just things like that.

"THE COURT: Okay, all right. Anything about the case itself or anything that we have discussed here in court?

"JUROR NUMBER 42: Oh, you know, not to Google, not to look into it in the papers. I guess it came out that it was a murder trial. That's all.

"THE COURT: Okay. Anything about . . . what few facts about the case . . . or the issues in the case?

"JUROR NUMBER 42: No, I don't—oh, I did mention, . . . I said they asked the question about self-defense. I didn't say one way or the other what about it. I just said somebody did ask the question about self-defense. That's all.

"THE COURT: Anything else about what we had discussed here in the courtroom?

"JUROR NUMBER 42: Nope."

Steven moved for a mistrial, or alternatively, to have Juror No. 42 removed from the jury. The trial court denied the motion and stated: "I don't think this rises to a mistrial. And I don't think it rises to the level of seating an alternate. I think it does require an admonishment clearly. And it requires an admonishment of all the jurors. I don't want to single him out, because I think that is counterproductive at this point. We're not far enough along where I need to admonish him individually and alienate him. I don't think that he has any way of attributing what I have inquired about to either side. He has no idea where my questions come from. [¶] . . . [¶] . . . I think both sides left people on for quite a period of time and then excused them."

The jury was again admonished: "You may not discuss this case with anyone, and even the nature of the charges, anything that goes on in this courtroom." After the jury was excused, the court noted: "From the chagrined look on Juror Number [42]'s face I don't think this is going to be an issue anymore."

After the jury returned its verdict, Steven moved for a new trial on the grounds of, inter alia, alleged juror misconduct (§ 1181, subd. 3). Among other things, Steven's trial counsel requested an evidentiary hearing "to determine, one, who the author of the note was, and, two, whether there was any juror impropriety in the note ending up in the Court's in-box." The trial court denied the motion, stating: "[F]rankly, I am not convinced that [it] necessarily came from a juror. . . . We had a lot of discussion about it. And it could have come from a number of sources, not necessarily a juror. . . . [¶] . . . There's a full record of our discussions about it, and my decisions with regard to how we were going to handle it. And my decisions at that time stand."

2. *Analysis*

Steven does not contend that the trial court's inquiry of Juror No. 42 was insufficient or that Juror No. 42 should have been excused and replaced. Rather, Steven argues that the trial court abused its discretion in failing to interview the other 11 jurors to inquire whether any had overheard Juror No. 42 and, if so, were prejudiced by what he or she overheard.[17] Steven contends: "[A]bsent inquiry of the other 11 jurors [the trial court] did not have all the requisite facts upon which to decide whether those jurors committed inadvertent misconduct, or could carry out their duties in an unbiased manner if they had."

Steven maintains that if any juror overheard Juror No. 42's conversation with his wife then such juror received "outside information" about the case. "It is misconduct for a juror during the course of trial to discuss the case with a nonjuror. [Citation.]" (*People v. Danks* (2004) 32 Cal.4th 269, 304.) Even " '[a] juror's inadvertent receipt of information that [has] not been presented in court falls within the general category of

[17] Steven's trial counsel made no contemporaneous request for such an inquiry.

"juror misconduct." ' [Citation.] 'Although inadvertent exposure to out-of-court information is not blameworthy conduct, as might be suggested by the term "misconduct," it nevertheless gives rise to a presumption of prejudice, because it poses the risk that one or more jurors may be influenced by material that the defendant has had no opportunity to confront, cross-examine, or rebut.' [Citation.]" (*Id.* at p. 307.)

Steven fails to persuade us that the trial court abused its discretion. Even assuming that the note was in fact written by another juror who overheard Juror No. 42's statements, there is no evidence that Juror No. 42 shared any "outside information." Juror No. 42 told his wife that it was a murder trial and mentioned that someone asked a question about self-defense. But, this was information that any juror present during voir dire would know. And, it is not true, as Steven contends, that "[t]he only way to determine what Juror no. [42] actually said, was to determine whether some other juror had, in fact overheard him." The trial court questioned Juror No. 42 and had the contents of the note before it. On this record, the trial court did not abuse its discretion.

B. *Prosecutorial Misconduct*

Next, Steven contends that his convictions should be reversed because he was denied his Fourteenth Amendment right to due process by prosecutorial misconduct. Specifically, Steven complains that the prosecutor, during opening statement and closing argument, improperly vouched for Smith and improperly denigrated Broadway's credibility.

"As a general matter, an appellate court reviews a trial court's ruling on prosecutorial misconduct for abuse of discretion. [Citation.]" (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.) "Under the federal standard, prosecutorial misconduct that infects the trial with such ' "unfairness as to make the resulting conviction a denial of due process" ' is reversible error. (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.) In contrast, under our state law, prosecutorial misconduct is reversible error where the prosecutor uses 'deceptive or reprehensible methods to persuade either the court or the jury' [citation] and ' "it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct" ' [citation]. To preserve a

misconduct claim for review on appeal, a defendant must make a timely objection and, unless an admonition would not have cured the harm, ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct. [Citation.]" (*People v. Martinez* (2010) 47 Cal.4th 911, 955–956, parallel citation omitted; accord, *People v. Padilla* (1995) 11 Cal.4th 891, 939–940, overruled on other grounds by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

"To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citation.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22.)

"A prosecutor may comment upon the credibility of witnesses based on facts contained in the record, and any reasonable inferences that can be drawn from them, but may not vouch for the credibility of a witness based on personal belief or by referring to evidence outside the record." (*People v. Martinez, supra,* 47 Cal.4th at p. 958.) "[A] prosecutor is free to give his opinion on the state of the evidence, and in arguing his case to the jury, has wide latitude to comment on both its quality and the credibility of witnesses. [Citations.] It is misconduct, however, to suggest to the jury in arguing the veracity of a witness that the prosecutor has information undisclosed to the trier of fact bearing on the issue of credibility, veracity, or guilt. The danger in such remarks is that the jury will believe that inculpatory evidence, known only to the prosecution, has been withheld from them. [Citations.]" (*People v. Padilla, supra,* 11 Cal.4th at pp. 945–946.) "Thus, it is misconduct for prosecutors to vouch for the strength of their cases by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it. [Citations.]" (*People v. Huggins* (2006) 38 Cal.4th 175, 206–207.) It is also misconduct for a prosecutor to express a personal belief that a witness is lying, rather than a belief based upon the evidence at trial. (*People*

v. Johnson (1981) 121 Cal.App.3d 94, 102.) "Nor is a prosecutor permitted to place the prestige of her office behind a witness by offering the impression that she has taken steps to assure a witness's truthfulness at trial. [Citation.]" (*People v. Frye, supra,* 18 Cal.4th at p. 971.)

With respect to Smith's credibility, Steven challenges the following comments during the prosecutor's opening statement: "So they take [Smith] back to the Richmond police station, where he is asked to give them the details of what had happened. I wish it was not necessary, but unfortunately in this area of town it is necessary, to surreptitiously videotape folks who are witnesses. And this is no exception. [Smith] was videotaped as he was giving his statement to the Richmond police department. [¶] And he tells them pretty much a synopsis of exactly what I have told you. There's no fabricating, there's no lying, there's no need to pull it out of him, he's obviously shook . . . ." Steven's trial counsel objected, on the ground that the prosecutor had improperly characterized Smith's testimony. The objection was overruled.

Steven also complains of the following excerpt from the prosecutor's closing argument:

"[PROSECUTOR:] What about [Smith]? I mean, he's an actual witness, right? Okay. Certainly, we want to hear what he has to say. . . . Before we just write off [Smith], let's understand [him] for a second. There is no way that you're going to get [Smith] to come in here to court and give you any kind of cooperative answers, as long as it's a public courtroom and you have got [Dominic] and D Dog and the boys all hanging out in the back, there's just no way. And I understand that. And quite frankly, when [Smith] was here I could have embarrassed him. I could have played the videotape right in front of him. . . . But I'm not going to do that. . . . There's a reason why the kid has to be taken down there in handcuffs. There's a reason why they videotape it. The rule of law is that we have to put [Smith] on and let him say what he's going to say, and then, and only then, *can we show you the truth in that videotape. The truth of his non-reflective, uncontrived–*

"[STEVEN'S TRIAL COUNSEL]: Objection. Characterization.

"THE COURT: Overruled. [¶] Ladies and gentlemen, this is closing argument. As I have explained to you, the attorneys argue their cases. The arguments aren't evidence. You will determine what the evidence is.

"[THE PROSECUTOR]: If you look at his videotape he is non-reflective. It is uncontrived. Words are not being put into his mouth. He is giving a narrative response, and he's giving a response at a point when he is emotional. *There isn't time for him to think up a story*. Two years haven't gone by." (Italics added.)

The prosecutor did not improperly vouch for Smith. Rather, the prosecutor simply asked the jury to infer that Smith's statements to police were credible because of Smith's observable demeanor and the fact that he made them so shortly after the shooting. The prosecutor also asked the jury to understand Smith's trial testimony, which did not incriminate Steven, as explained by the fact that his police interview had been circulating in the neighborhood. The prosecutor did not suggest that his belief, that Smith told the police the truth, was based on his own personal investigation rather than the evidence presented at trial. The challenged remarks were fair comment on the evidence and the trial court properly overruled Steven's objections. (See *People v. Padilla, supra,* 11 Cal.4th at p. 946.)

The prosecutor's argument with respect to Broadway is more troubling. In his closing argument, the prosecutor challenged Broadway's credibility and characterized Broadway's claimed lack of recollection of significant details surrounding the shooting as "silly." Steven's trial counsel argued during her own closing argument that Broadway's testimony was believable because he had risked criminal liability, as an aider and abettor to murder. In his rebuttal argument, the prosecutor responded as follows:

"[THE PROSECUTOR:] Mr. Broadway comes in here, and we have some high theater here where I'm asking him a question. It's the same question I have been asking him, that is, tell us something, besides your one perception that [Smith] had a gun. And he says, Aw, I want to talk to my lawyer. And his court appointed counsel walks up there and we have a little talk. That's some high theater right there.

"The fact of the matter is the lawyer knows, Broadway knows that there's no way [Broadway] can ever be prosecuted. You know why? Because ethically we can't prosecute him. You know why? *Because* [*Broadway*] *is lying. I can't prosecute somebody that I know is lying*.

"[STEVEN'S TRIAL COUNSEL]: Objection. He can't state his opinion of somebody's truth or veracity. That's for the jury and it's misconduct.

"[THE PROSECUTOR]: It's rebuttal.

"THE COURT: Overruled. [¶] Ladies and gentlemen, as I have explained to you before, this is closing argument. You will determine what the facts are. I have given you the law that applies in this case.

"[THE PROSECUTOR]: *If ethically I would put somebody on trial that I did not believe committed a crime, not only would that be something horrible for me to do*, but let's figure out what [Broadway's] defense attorney would say. Wow, he was lying to cover up for his buddy. And you know what, that would be a pretty good defense, wouldn't it?" (Italics added.)

"Referring to testimony as 'lies' is an acceptable practice so long as the prosecutor argues inferences based on the evidence and not on the prosecutor's personal belief." (*People v. Sandoval* (1992) 4 Cal.4th 155, 180.) But, here, the prosecutor's comments go beyond merely asking the jury to infer that Broadway was lying because of the inherent incredibility of Broadway's testimony or because Broadway was a friend of Steven's. Contrary to Steven's suggestion on appeal, the prosecutor did not suggest that he could not ethically prosecute Broadway for perjury. But, he did inform the jury that he could not ethically prosecute Broadway as an aider and abettor to murder because he did not believe the testimony. Although that opinion may have been based on the evidence, the problem is that the prosecutor was, in effect, invoking the reputation of the district attorney's office to assure the jury that he would not prosecute the innocent.

In *People v. Alvarado* (2006) 141 Cal.App.4th 1577, 1580 (*Alvarado*), the Second District Court of Appeal concluded that similar remarks by a prosecutor constituted misconduct. In that case, the prosecutor said: " 'I have a duty and I have taken an oath

as a deputy District Attorney not to prosecute a case if I have any doubt that that crime occurred. [¶] The defendant charged is the person who did it.' " (*Id.* at p. 1583, italics omitted.) Despite the fact that the prosecutor was responding to attacks by defense counsel alleging improper coaching of witnesses, the appellate court concluded the prosecutor had "impermissibly invited the jury to convict Alvarado based on her opinion that he was guilty and on the prestige of her office . . . ." (*Id.* at pp. 1584–1585.) The court further observed: "The only reasonable inference from these comments is that (1) the prosecutor would not have charged Alvarado unless he was guilty, (2) the jury should rely on the prosecutor's opinion and therefore convict him, and (3) the jurors should believe [the witness] for the same reason. This argument constituted misconduct." (*Id*. at p. 1585.)

The *Alvarado* court concluded that the misconduct was prejudicial and that an admonishment would not have cured the harm. (*Alvarado, supra,* 141 Cal.App.4th at pp. 1585–1586.) The evidence against Alvarado was not overwhelming, as there was only one eye witness to the crime, whose accounts of the crime contained inconsistencies. When arrested, Alvarado did not possess any of the items reported stolen. Because the prosecution's case turned on the eye witness's credibility, the reviewing court determined that "it [was] too late for an admonition to unring the bell sounded by the prosecutor's improper attempt to bolster his credibility." (*Id.* at p. 1586.) Furthermore, the prosecutor made more than just the one suggestion to the jury that she had additional evidence of Alvarado's guilt that had not been presented. (*Ibid.*)

In *Alvarado,* however, the prosecutor invoked the prestige of her office to implicitly assure the jury that the *defendant* would not have been charged without sufficient evidence of his guilt. Here the prosecution sought to rebut argument by Steven's counsel, that Broadway's testimony had subjected him to potential criminal liability and was therefore inherently credible, by arguing that Broadway would not and could not be prosecuted based on that testimony. While the prosecutor's comments certainly presented a risk that jurors might unduly rely on such statements in evaluating Broadway's credibility, we also note that the comments were not as direct nor as

damaging as the comments made in *Alvarado,* and were isolated and brief. Even if we accept that the prosecutor's remarks in this case were misconduct, they were not prejudicial. Reversal for prosecutorial misconduct is called for only when, after reviewing the totality of the evidence, we can determine it is reasonably probable that a result more favorable to the defendant would have occurred absent the misconduct.[18] (*People v. Hill, supra*, 17 Cal.4th at p. 844; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Although the trial court overruled Steven's objection, it admonished the jury to decide the case on the evidence. This cured any misconduct. (See *People v. Castillo* (2008) 168 Cal.App.4th 364, 386 [if trial judge promptly instructs jury to disregard prosecutor's improper statements during voir dire, error will ordinarily be cured]; but see *Alvarado, supra,*141 Cal.App.4th at pp. 1581, 1585 [concluding no admonition would have cured prejudice].)

It is true that, at least with respect to the attempted murder count, the jury was confronted with a conflict between Broadway's testimony and Smith's statements that neither he nor Tiyani had a gun. But, Broadway's testimony was already inherently suspect when he asserted that he could remember essentially nothing other than Smith having a gun. And Smith's testimony was corroborated by the physical evidence and the testimony of both Neal and Jackson that neither Smith or Tiyani had a gun. Finally, with respect to the murder count, the evidence strongly suggested that Steven followed Tiyani—who may have had an unfired bullet, but not a gun—more than a block away, then fired multiple shots at Tiyani's back as he jumped over a fence some distance away. And, as Steven's counsel notes, after a 22-day trial, the jury was able to reach relatively quick verdicts—in under five hours.[19] Thus, it is not reasonably probable that a result

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[18] The prosecutor's isolated comment certainly did not render the trial fundamentally unfair. Thus, the *Chapman v. California* (1967) 386 U.S. 18 standard of harmless error does not apply.

[19] Steven points to the quick verdicts as evidence of prejudice, citing *People v. Markus* (1978) 82 Cal.App.3d 477 (*Markus*) for the proposition that error cannot be presumed harmless where "a very brief period of time elapses between the final

more favorable to Steven would have been reached if the prosecutor had not engaged in this single instance of misconduct.

C. *Failure to Instruct in Accordance with CALCRIM No. 371*

As noted above, evidence was presented at trial, over Steven's objection and unsuccessful motions for mistrial, regarding attempts to intimidate witnesses. On appeal, Steven does not challenge admission of this evidence, but contends that the trial court erred by failing to instruct the jury, in accordance with CALCRIM No. 371, Alternative C, that absent evidence that Steven knew or approved of the suppression attempts by third persons, the jury could not infer consciousness of guilt.

CALCRIM No. 371 provides, in relevant part: "<*Alternative C—fabrication or suppression by a third party*> [¶] [If someone other than the defendant tried to create false evidence, provide false testimony, or conceal or destroy evidence, that conduct may show the defendant was aware of (his/her) guilt, *but only if the defendant was present and knew about that conduct, or, if not present, authorized the other person's actions*. It is up to you to decide the meaning and importance of this evidence. However, evidence of such conduct cannot prove guilt by itself.]" (Italics added.)

" ' "Efforts to suppress testimony . . . indicate a consciousness of guilt on the part of a defendant, and evidence thereof is admissible against him. [Citation.] Generally, evidence of the attempt of third persons to suppress testimony is inadmissible against a defendant where the effort did not occur in his presence. [Citation.] However, if the defendant has authorized the attempt of the third person to suppress testimony, evidence of such conduct is admissible against the defendant." ' [Citation.]" (*People v. Hannon* (1977) 19 Cal.3d 588, 599 (*Hannon*); accord, *People v. Perez* (1959) 169 Cal.App.2d 473, 477–478.)

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instruction and the rendering of a verdict." That is not the holding of *Markus*. In *Markus*, the court found presumed prejudice from a quick verdict following an erroneous *supplemental* instruction given in response to a jury inquiry. (*Markus*, at p. 482, disapproved on another point by *People v. Montoya* (1994) 7 Cal.4th 1027, 1040.)

On the other hand, "evidence that a witness is afraid to testify is admissible as relevant to the witness's credibility. (Evid. Code, § 780[20]; *People v. Warren* (1988) 45 Cal.3d 471, 481.)" (*People v. Sapp* (2003) 31 Cal.4th 240, 301.) "Testimony a witness is fearful of retaliation similarly relates to that witness's credibility and is also admissible. [Citation.] It is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible. [Citation.]" (*People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1588.)

Our Supreme Court has recently explained: "[We have] held that evidence of a third party's attempt to intimidate a witness is inadmissible against a defendant unless there is reason to believe the defendant was involved in the intimidation. (E.g., *People v. Williams* (1997) 16 Cal.4th 153, 200–201; [*Hannon, supra,*]19 Cal.3d [at p.] 599.) But we were responding to the use of the evidence to show the defendant's consciousness of guilt; we were not concerned with whether it was relevant to some other issue, such as the witness's credibility. (*Hannon*, at p. 599; *People v. Weiss* (1958) 50 Cal.2d 535, 554.) Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact or consequence, including evidence relevant to the credibility of a witness. [Citations.] Thus, ' "[e]vidence that a witness is afraid to testify or fears retaliation for

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[20] Evidence Code section 780 provides: "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: [¶] (a) His demeanor while testifying and the manner in which he testifies. [¶] (b) The character of his testimony. [¶] (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies. [¶] (d) The extent of his opportunity to perceive any matter about which he testifies. [¶] (e) His character for honesty or veracity or their opposites. [¶] (f) *The existence or nonexistence of a bias, interest, or other motive*. [¶] (g) A statement previously made by him that is consistent with his testimony at the hearing. [¶] (h) A statement made by him that is inconsistent with any part of his testimony at the hearing. [¶] (i) The existence or nonexistence of any fact testified to by him. [¶] (j) *His attitude toward the action in which he testifies or toward the giving of testimony*. [¶] (k) His admission of untruthfulness." (Italics added.)

testifying is relevant to the credibility of that witness and is therefore admissible. [Citations.] An explanation of the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court. [Citations.]" ' [Citation.]" (*People v. Abel* (2012) 53 Cal.4th 891, 924–925, parallel citations omitted.)

Specifically, Steven argues: "[Testimony regarding threats to witnesses] actually is permitted, as it explains a reluctant witness's 'state of mind.' This is true even though none of these three witnesses testified that [Steven] himself was the one who threatened them. The problem, however, is that as the jurors knew [Steven] was not above threatening witnesses (in light of testimony about his 2005 actions), the jurors likely inferred [Steven] was behind these 2010 attempts to intimidate witnesses and suppress their testimony. Absent instruction, the jury would use that against [Steven]." *Hannon* does not support Steven's argument. The *Hannon* court held that "it is . . . error to instruct a jury that it can infer a consciousness of guilt if it believes" evidence purporting to show suppression or attempted suppression of evidence absent the prerequisite proof of defendant's authorization. (*Hannon, supra,* 19 Cal.3d at p. 600.) In this case, no one requested that the jury be instructed as to when consciousness of guilt could be inferred from attempts to suppress evidence.[21] Such a purpose was never suggested by the

[21] The trial court had no sua sponte obligation to give such an instruction. (*People v. Najera* (2008) 43 Cal.4th 1132, 1139 ["the instructions concerning consciousness of guilt . . . recite that such evidence is not sufficient by itself to prove guilt, yet we have never held that the trial court has a sua sponte duty to instruct the jury accordingly"]; *People v. Sapp, supra,* 31 Cal.4th at p. 301; *People v. Padilla, supra,*11 Cal.4th at p. 950; see also *People v. Lang* (1989) 49 Cal.3d 991, 1020 ["[t]rial courts generally have no duty to instruct on the limited admissibility of evidence in the absence of a request"]; *People v. Collie* (1981) 30 Cal.3d 43, 63–64 [trial court has no sua sponte duty to instruct on limited admissibility of past criminal conduct evidence].) Although our Supreme Court has left open the possibility that such a duty might be found to exist in " 'an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose,' " this is not such a case. (*People v. Lang,* at p. 1020; *People v. Collie,* at p. 64.)

prosecutor. Instead, the trial court explained to the jury, on several occasions, that such evidence was only to be used to help explain the witnesses' state of mind.

The facts presented here are similar to those presented in *People v. Olguin* (1994) 31 Cal.App.4th 1355 (*Olguin*). In *Olguin,* a witness to a shooting testified that an unidentified person telephoned him a few days after the shooting saying "he had better watch his back," and someone had "spray-painted the word 'Rata' (Spanish for 'rat') on his driveway." (*Id.* at p. 1368.) The reviewing court noted that the trial court had correctly limited the admissibility of the evidence to the witness's attitude towards testifying and presumed that the jury adhered to the trial court's limitations. (*Ibid.*) The court observed: "California law prohibits proving consciousness of guilt by establishing attempts to suppress evidence unless those attempts can be connected to a defendant. ([*Hannon, supra,*] 19 Cal.3d [at pp.] 596–600; *People v. Weiss*[, *supra,*] 50 Cal.2d [at pp.] 551–554.) But that was not done here. There was never an argument, never even a suggestion, that this evidence reflected consciousness of guilt. It was strictly limited to establishing the witness's state of mind. For this purpose it was highly relevant. [¶] . . . [¶] Regardless of its source, the jury would be entitled to evaluate the witness's testimony knowing it was given under such circumstances. And they would be entitled to know not just that the witness was afraid, but also, within the limits of Evidence Code section 352, those facts which would enable them to evaluate the witness's fear. A witness who expresses fear of testifying because he is afraid of being shunned by a rich uncle who disapproves of lawyers would have to be evaluated quite differently than one whose fear of testifying is based upon bullets having been fired into her house the night before the trial. The trial court acted well within its discretion in insuring the jury would have such evidence and would properly evaluate it." (*Olguin, supra,* 31 Cal.App.4th at pp. 1368–1369, italics & parallel citations omitted.)

Here too, the trial court instructed the jury on several occasions that evidence of witness intimidation was admissible only for purposes of evaluating the witness's state of mind. In addition, the trial court instructed the jury at the end of trial: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence

only for that purpose and for no other." (CALCRIM No. 303.) We presume that the jury followed the court's instructions and cannot presume that they speculated regarding consciousness of guilt. On one occasion, when McElveen testified regarding Dominic's threat to her, the jury was not immediately admonished regarding the limited purpose for which such testimony could be considered. But, even if this constituted error, any such error was harmless. As noted above, the case against Steven was strong. It is not reasonably probable the jury would have reached a different verdict absent the error. (*Hannon, supra,* 19 Cal.3d at p. 603; *People v. Watson, supra,* 46 Cal.2d at p. 836.)

D. *Character Evidence*

Next, Steven argues that the trial court denied him his constitutional rights to due process and a fair trial by failing to instruct the jury on the proper use of rebuttal evidence regarding his character for violence.

1. *Background*

In support of Steven's theory of self-defense, evidence of Tiyani's character for violence was introduced—through Montgomery's testimony regarding the shooting at her house, Cook's testimony regarding Tiyani's stated desire to kill Steven, and evidence that Tiyani had possessed firearms.[22] In response to that evidence, the prosecution successfully sought admission of evidence, pursuant to Evidence Code section 1103, of

[22] "The law [of self-defense] recognizes that the objective component is not measured by an abstract standard of reasonableness but one based on the defendant's perception of imminent harm or death. Because his state of mind is a critical issue, he may explain his actions in light of his knowledge concerning the victim. [Citations.] Antecedent threats as well as the victim's reputation for violence, prior 'assaults, and other circumstances [are] relevant to interpreting the attacker's behavior.' [Citations.] While such considerations alone do not establish a right of self-defense [citation], they illuminate and reflect on the reasonableness of defendant's perception of both the imminence of danger and the need to resist with the degree of force applied. [Citation.] They may also justify the defendant 'in acting more quickly and taking harsher measures for her own protection in the event of assault, whether actual or threatened, than would a person who had not received such threats.' [Citation.]" (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1094.)

Steven's tattoos and his involvement in Atkinson's robbery. Steven's motion in limine to exclude the evidence was denied.

When Steven's trial counsel asked for a limiting instruction before the robbery testimony, the prosecutor responded: "[I]t's difficult for the Court to fashion a limiting instruction previous to the presentation of the evidence, simply because . . . this is not [Evidence Code section] 1101[, subdivision] (b) evidence, this is [Evidence Code section] 1103 evidence." The trial judge (Hon. Laurel Brady) denied the request, stating: "[T]here's a specific instruction that deals with that, so the jury will be instructed how to deal with that. [¶] . . . [¶] I think that the instruction that the jury will be given [at the close of evidence] is adequate. . . . [¶] . . . [¶] . . . Prior to [Atkinson] taking the stand, what I will tell the jury is that this evidence is coming in for a limited purpose. You will get instructions as to the purpose of this evidence tomorrow, so they're keyed to that."

The jury was instructed: "In evaluating the defendant's beliefs [regarding imminent danger and the need for immediate use of deadly force], consider all the circumstances as they were known and appeared to the defendant. [¶] If you find that [Tiyani] threatened or harmed the defendant in the past, you may consider that information in evaluating the defendant's beliefs. [¶] If you find that the defendant knew that [Tiyani] had threatened or harmed others in the past, you may consider that information in evaluating the defendant's beliefs." The jury was also instructed: "During the trial certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and no other."

However, during their deliberations, the jury sent the following note: "On 3/25, during rebuttal case, in morning, [Atkinson] . . . testified about [Steven] pulling gun at a party. The Judge indicated this testimony was for a limited purpose, which she would explain later. She never did. For what purpose was this testimony allowed?"

After discussing the note with counsel, and observing "there is no instruction relating to [Evidence Code section 1103] in either CALCRIM or CALJIC," the trial court instructed the jury, with a modified version of CALCRIM No. 1191, which is the pattern instruction given when evidence of prior sex crimes is admitted under Evidence Code

section 1108.[23] The instruction given to the jury provides: "The People presented evidence that the defendant has a violent character. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact has a character for violence. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant has a violent character you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit crimes of violence, and based on that decision, also conclude that the defendant was likely to commit and did commit murder and attempted murder as charged here. If you conclude that the defendant has a character for violence, that conclusion is only one factor to consider along with all of the other evidence. It is not sufficient by itself to prove that the defendant is guilty of murder or attempted murder. The People must still prove each charge and allegation beyond a reasonable doubt."

2. *Analysis*

Steven argues that the rebuttal evidence introduced by the prosecution "was character evidence, **not** 'propensity' evidence" and that the trial court improperly instructed the jury it could use this evidence to infer that Steven had a propensity for violence. Steven also contends: "As propensity evidence requires a standard of proof lower than 'beyond a reasonable doubt,' and as such evidence permits a jury to find a defendant had the propensity to commit the type of crime with which he is currently charged (which character evidence does not allow), the misinstruction in this case violated [Steven's] federal constitutional rights, and . . . reversal of [Steven's] convictions is required."

[23] Judge John Kennedy responded to the jury note, as Judge Brady was ill and unavailable.

Steven draws an invalid distinction between "character evidence" and "propensity evidence." Generally, "[c]haracter evidence is not admissible to show conduct on a specific occasion. (Evid. Code, § 1101, subd. (a).) *This type of evidence sometimes is referred to as evidence of criminal disposition or propensity*. [Citation.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1147, italics added.) "As a general rule, evidence that is otherwise admissible may be introduced to prove a person's character or character trait. ([Evid. Code,] § 1100.) But, except for purposes of impeachment (see [Evid. Code,] § 1101, subd. (c)), such evidence is inadmissible when offered by the opposing party to prove the defendant's conduct on a specified occasion ([Evid. Code,] § 1101, subd. (a)), unless it involves commission of a crime, civil wrong or other act and is relevant to prove some fact (e.g., motive, intent, plan, identity) *other than a disposition to commit such an act* ([Evid. Code,] § 1101, subd. (b))." (*People v. Falsetta* (1999) 21 Cal.4th 903, 911.)

An exception to the general rule is established by Evidence Code section 1103.[24] (See Evid. Code, § 1101, subd. (a) ["[*e*]*xcept as provided in* this section and in Sections 1102, *1103*, 1108, and 1109, evidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion" (italics added)].) " 'It has long been recognized that where self-defense is raised in a homicide case, evidence of the aggressive and violent character of the victim

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[24] Evidence Code section 1103 provides, in relevant part: "(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character. [¶] (2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1). [¶] (b) In a criminal action, evidence of the defendant's character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 *if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character* or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a)." (Italics added.)

is admissible.' [Citations.] Under Evidence Code section 1103, such character traits can be shown by evidence of specific acts of the victim on third persons as well as by general reputation evidence. [Citation.]" (*People v. Wright* (1985) 39 Cal.3d 576, 587.) Thus, in self-defense cases, when a defendant presents evidence of the victim's character for violence, the prosecution may produce rebuttal evidence of the defendant's own character for violence, which may be used to draw propensity inferences. (Evid. Code, § 1103, subd. (b); *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1173–1175; *People v. Myers* (2007) 148 Cal.App.4th 546, 552–553.)

Our Supreme Court recently rejected a challenge to a similar instruction regarding evidence of violent character under Evidence Code section 1103, subdivision (b). (*People v. Fuiava* (2012) 53 Cal.4th 622, 694–696 (*Fuiava*).)[25] In *Fuiava,* the court paraphrased the requirements of Evidence Code section 1103 as follows: "In other words, if, as in the present case, a defendant offers evidence to establish that the victim was a violent person, thereby inviting the jury to infer that the victim acted violently during the events in question, then the prosecution is permitted to introduce evidence demonstrating that (1) the victim was not a violent person and (2) the defendant was a violent person, *from which the jury might infer it was the defendant who acted violently*." (*Fuiava,* at p. 696, italics added.) In rejecting the defendant's due process challenge, the *Fuiava* court also observed: "Defendant's reliance on various judicial statements regarding the long-standing common law tradition of disallowing the use of propensity evidence to prove the defendant's conduct on a particular occasion is misguided for two primary reasons. First, . . . the existence of a general historical bar of the use of propensity evidence to prove the defendant's conduct does not mean that the

[25] The *Fuiava* jury was instructed: " 'A person's character for violence may be shown by evidence of reputation, opinion, or specific acts of violence. Evidence of a person's character for violence may tend to show the person acted in conformity with such character. [¶] Whether a person had a character for violence and whether he acted in conformity with such character are matters for the jury to decide.' " (*Fuiava, supra,* 53 Cal.4th at pp. 694–695.)

Legislature's enactment of a contrary rule necessarily is at odds with affording defendants fundamentally fair trials. [Citation.] Second, none of the cases defendant cites addressed the use of propensity evidence in the particular context at issue in the present case—the admission of evidence establishing defendant's propensity for violence to prove violent conduct on defendant's part (not merely criminal propensity to prove criminal conduct), which was presented to the jury only after defendant elicited evidence of the victim's violent propensity. [¶] We cannot say that, in providing for the jury to obtain a balanced view of the possible violent tendencies of both the victim and the defendant, the Legislature ran afoul of any fundamental conception of justice embodied in the federal Constitution." (*Id.* at pp. 697–698.) The court also explained: "[T]he statute places no unfair burden upon the defendant because it leaves to the defendant the choice whether evidence of his or her *violent propensity* will be admissible. The statute also limits the admissible evidence to that establishing the defendant's character for violence, which, pursuant to sections 210 and 350 of the Evidence Code, must be relevant to a material issue in the trial. Although the statute does not contain an explicit statement of the applicability of Evidence Code 352 . . . , we discern nothing in section 1103[, subdivision] (b) prohibiting a trial court from exercising its discretion to limit the admission of violent propensity evidence in the interest of fostering judicial efficiency, or preventing 'undue prejudice' to the defendant. In sum, the statute remains constitutional because it does not 'unduly "offend" ' any fundamental principles advanced by the general practice of barring the use *of propensity evidence* to prove a defendant's conduct. [Citation.] [¶] For these reasons, defendant's challenge to the trial court's instruction regarding the consideration of evidence concerning *his violent propensity* fails." (*Fuiava, supra,* 53 Cal.4th at p. 700, italics added.)

Although the *Fuiava* court did not directly confront an argument that Evidence Code section 1103 rebuttal evidence is properly admitted only for some purpose other than to show propensity, we agree with the People that the *Fuiava* court's reasoning, as well as the plain language of Evidence Code section 1103, subdivision (b), contradict Steven's argument. And, by instructing as it did, the trial court did not reduce the

prosecution's burden of proving its case beyond a reasonable doubt. The jury was properly instructed regarding the presumption of innocence and the prosecutor's burden of proof. Furthermore, the jury was instructed that evidence of Steven's violent character was not sufficient by itself to prove Steven's commission of the charged offenses, and that the People must still prove each charge beyond a reasonable doubt.[26] Thus, the jury could not have interpreted the instructions as authorizing a guilty verdict based solely on proof of the uncharged conduct. Nor could a reasonable jury have interpreted the instructions as authorizing conviction of the charged offenses based on a preponderance of the evidence standard. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1013, 1016 [reaching same conclusions when CALJIC No. 2.50.01 instructed jury regarding Evid. Code, § 1108 evidence].)

E. *Unanimity Instruction*

Next, Steven argues that the trial court erred in refusing, on request, to give a unanimity instruction, pursuant to CALCRIM No. 3500.[27] Specifically, Steven contends: "[T]he evidence established there were two crime scenes, in one of which [Steven] likely had the right to fire in self-defense and in the other of which he did not. Thus the verdicts may not have been unanimous, because the jury could have found [Steven] had different mental states at the separate crime scenes, [and] disagreed on which particular act [he] committed." (Fn. omitted.)

"Defendants in criminal cases have a constitutional right to a unanimous jury verdict. [Citation.] From this constitutional principle, courts have derived the

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[26] Thus, the instruction given by the trial court was actually more favorable to Steven than the instruction given in *Fuiava.*

[27] CALCRIM No. 3500 provides: "The defendant is charged with _____ <insert description of alleged offesnse> [in Count _____] [sometime during the period of _____ to _____]. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

requirement that if one criminal act is charged, but the evidence tends to show the commission of more than one such act, '*either* the prosecution must elect the specific act relied upon to prove the charge to the jury, *or* the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act.' [Citations.]" (*People v. Napoles* (2002) 104 Cal.App.4th 108, 114; see also Cal. Const., art. I, § 16.)

"On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed . . . , the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty. [Citation.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) The unanimity requirement " 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.]" (*Ibid*.) "But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*Id.* at p. 1135.)

"The crime of burglary provides a good illustration of the difference between discrete crimes, which require a unanimity instruction, and theories of the case, which do not. Burglary requires an entry with a specified intent. (. . . § 459.) If the evidence showed two different entries with burglarious intent, for example, one of a house on Elm Street on Tuesday and another of a house on Maple Street on Wednesday, the jury would have to unanimously find the defendant guilty of at least one of those acts. If, however, the evidence showed a single entry, but possible uncertainty as to the exact burglarious

intent, that uncertainty would involve only the theory of the case and not require the unanimity instruction. [Citation.] Other typical examples include the rule that, to convict a defendant of first degree murder, the jury must unanimously agree on guilt of a specific murder but need not agree on a theory of premeditation or felony murder [citation], and the rule that the jury need not agree on whether the defendant was guilty as the direct perpetrator or as an aider and abettor as long as it agreed on a specific crime [citation]." (*People v. Russo, supra,* 25 Cal.4th at pp. 1132–1133.)

We agree with the trial court that the jury was not required to agree unanimously on which bullet killed Tiyani. There were not two distinct murders. Although there were two crime scenes, there was only a single discrete criminal event—the murder of Tiyani—regardless of which bullet in the sequence of shots actually killed him. Whether the fatal bullet was fired on Groom or on Gilma only concerns the way in which the crime was committed. No unanimity instruction is required " 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' " (*People v. Russo, supra,* 25 Cal.4th at pp. 1134–1135; *People v. Datt* (2010) 185 Cal.App.4th 942, 949–951.)

In arguing that we should ignore the distinction between distinct criminal events and multiple acts, Steven relies on *People v. Crandell* (1988) 46 Cal.3d 833, 874–875 (*Crandell*). In *Crandell*, which was decided by our Supreme Court before *People v. Russo,* the court considered whether, in a murder case, the jury must agree unanimously on the act or acts which caused death. Specifically, the defendant argued that a unanimity instruction was required because there was evidence that the victim's death could have resulted from either a gunshot wound or strangulation, or the combined effects of both. (*Id.* at p. 874.) Although there was no uncertainty that the defendant committed both acts, the evidence regarding self-defense differed as to the two injuries. (*Id.* at p. 875.)

The *Crandell* court observed: "The unanimity instruction is not required when the acts are so closely connected in time as to form part of one transaction. [Citations.] This branch of the 'continuous conduct' exception [citation] applies *if the defendant tenders*

the same defense or defenses to each act and if there is no reasonable basis for the jury to distinguish between them. [Citations.] [¶] We need not decide in this case whether the self-defense evidence was sufficiently different as to each act, and of sufficient weight, to mandate the instruction on unanimity. Assuming arguendo that failure to give the instruction was error, no prejudice resulted. As previously mentioned, the jury found by its verdicts that [the victim] was killed by defendant . . . and that defendant deliberated and premeditated both homicides. These verdicts necessarily imply a complete rejection of all the self-defense evidence presented by defendant. Thus any difference in the self-defense evidence as to the shooting and strangulation . . . was without significance and no prejudice could have resulted from the omission of a unanimity instruction." (*Crandell, supra,* 46 Cal.3d at p. 875, italics added & omitted.)

Even if we assume, as the *Crandell* court did, that the trial court's failure to give the instruction was error, no prejudice resulted. (*Crandell, supra,* 46 Cal.3d at p. 875.) The jury found Steven guilty of the attempted murder of Smith. The prosecutor made clear, in his argument, that "[t]he attempted murder is for the shots on Groom." And there was no evidence that any shots were fired towards Smith on Gilma. Thus, the jury necessarily rejected Steven's self-defense evidence. There is a split in authority regarding the harmless error standard applicable to failure to give a unanimity instruction. (Compare *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536 [applying harmless beyond a reasonable doubt standard] with *People v. Vargas* (2001) 91 Cal.App.4th 506, 562 [applying no reasonable probability of prejudice standard].) We need not resolve this conflict because, under either standard, Steven was not prejudiced by the omission of a unanimity instruction.

F. *Failure to Further Define "Kill Zone"*

Finally, Steven contends that the trial court erred, and denied him his Fourteenth Amendment right to a fair trial, by refusing to further define a "kill zone" in response to a jury question. With respect to attempted murder, the jury was instructed, pursuant to CALCRIM No. 600, in relevant part: "To prove that the defendant is guilty of attempted murder, the People must prove that: [¶] 1. The defendant took at least one direct but

ineffective step toward killing another person; [¶] AND [¶] 2. *The defendant intended to kill that person.* [¶] . . . [¶] A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of [Smith], the People must prove that the defendant not only intended to kill [Tiyani] but also *either intended to kill* [*Smith*]*, or intended to kill everyone within the kill zone.* If you have a reasonable doubt whether the defendant intended to kill [Smith] or intended to kill [Tiyani] by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of [Smith.]" (Italics added.)

During their deliberations, the jury sent the trial court a note that asked: "What is the definition of a 'kill zone.'?" After discussing the issue with counsel, the trial court responded: "The term 'kill zone' is defined in CALCRIM 600 as a particular zone of harm. I cannot provide a more specific definition. As noted in the instructions, terms not specifically defined are to be given their ordinary everyday meanings. This is a factual issue for the jury to decide." Steven's trial counsel objected to the trial court's response.

"The trial court has the primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] In *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212, the Supreme Court held that section 1138 imposes on the trial court a mandatory 'duty to clear up any instructional confusion expressed by the jury. [Citations.]'[28] However, the standard does not require trial court elaboration on the standard instructions in every instance. When the original instructions are full and complete, the trial court has discretion to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.]" (*People v. Moore* (1996) 44 Cal.App.4th 1323,

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[28] Section 1138 provides: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

1331, parallel citation omitted.) "[A] court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least consider how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*People v. Beardslee* (1991) 53 Cal.3d 68, 97, italics omitted.)

In this instance, the trial court properly determined that further explanation was not required. " ' "[A]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." [Citations.]' [Citation.]" (*People v. Perez* (2010) 50 Cal.4th 222, 229–230, fn. omitted.) " ' "[G]uilt of attempted murder must be judged separately as to each alleged victim." ' [Citation.]" (*Id.* at p. 230.)

The "kill zone" concept is derived from our Supreme Court's decision in *People v. Bland* (2002) 28 Cal.4th 313 (*Bland*). In *Bland*, the court rejected the argument that the "transferred intent" doctrine applied to attempted murder. (*Id.* at pp. 326–331.) But, the *Bland* court also went on to observe: "The conclusion that transferred intent does not apply to attempted murder still permits a person who shoots at a group of people to be punished for the actions toward everyone in the group even if that person primarily targeted only one of them. . . . [¶] [A]lthough the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within . . . the 'kill zone.' 'The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created 'a kill zone' to ensure the death of his primary victim,

and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the fact finder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death. . . . Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the fact finder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.' . . . [Citation.]" (*Id.* at pp. 329–330.)

Steven complains that the trial court did not provide the definition of "kill zone" provided in CALJIC No. 8.66.1.[29] But, our Supreme Court has instructed that the " 'kill zone' theory 'is not a legal doctrine requiring special jury instructions . . . . Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others.' [Citation.]" (*People v. Stone* (2009) 46 Cal.4th 131, 137, quoting *Bland, supra,* 28 Cal.4th at p. 331, fn. 6; accord, *People v. Smith* (2005) 37 Cal.4th 733, 746.)

In any event, although the trial court did not use the precise words used in CALJIC No. 8.66.1, we think the instructions given to the jury make clear that a "kill zone" is the vicinity in which the defendant intends to kill anyone present.[30] Steven insists that

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[29] CALJIC No. 8.66.1 provides: "A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. [This zone of risk is termed the 'kill zone.'] The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim *by killing everyone in that victim's vicinity*. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a ['kill zone'] [zone of risk] is an issue to be decided by you." (Italics added.)

[30] The prosecutor's closing argument did not suggest a different definition. In his closing argument, the prosecutor told the jury: "[A]ttempted murder requires a couple of things. [¶] One is it requires the intent to kill. [¶] The second is it requires a direct step but ineffective towards that killing. [¶] Other part here is called the zone of risk. . . . What

further definition was required in this case because there were two crime scenes. There was evidence that, at the initial crime scene, Steven stopped the car and got out, immediately firing four or five gunshots at Smith and Tiyani. Thus, Steven concedes that "a 'kill zone' would be easy to envision" while Tiyani and Smith were together on Groom. But, Steven argues: "Once they started running . . . the kill zone widened. At first they were running together on Groom (so presumably a kill zone embracing both of them still existed); then they were separated by a bus (but a kill zone encompassing the area of the bus still was possible); then Smith turned on Shane and ran toward Gilma while Tiyani continued running on Groom (so that the area between them widened, but they theoretically were still within the same kill zone so long as both were visible to a pursuer); then Smith lost sight of [Tiyani] (so that presumably they no longer were both within a kill zone); and then Smith wound up on Gilma, where he hopped a fence, while [Tiyani] somehow also wound up on Gilma, where he hopped a different fence (and thus they may once again have been within the same kill zone)."

But, we evaluate Steven's challenge to CALCRIM No. 600 by determining whether there is a reasonable likelihood the jury misconstrued or misapplied its words. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1243.) Steven fails to acknowledge that "*Bland*'s kill zone theory of multiple attempted murder is necessarily defined by the nature and scope of the attack." (*People v. Perez, supra,* 50 Cal.4th at p. 232.) Steven is arguing that the jury could have concluded that Smith was within the kill zone when shots were fired at Tiyani on Gilma. But, the prosecutor made clear, in his argument, that

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does that mean? Let's suppose that I'm standing in a crowd. I'm standing with a whole bunch of people that I don't even know. They're all right next to me. And let's suppose my sworn enemy drives by and he sprays the crowd because he wants to kill me. Does that mean that it's not attempted murder against all those people that were standing next to me? No. And the reason for that is because when you take a direct but ineffective step at attempting to kill one person and there's another person who you're, hey, I don't care if that person gets killed, as far as I'm concerned, I can kill that person, too, as long as I kill the other person, then that person is in the zone of risk. So the bystander is in the zone of risk, then that's attempted murder on the bystander. . . . [Smith] is within the zone of risk."

"[t]he attempted murder is for the shots on Groom." Moreover, as to the shots on Gilma, there is only evidence of shots fired toward 2993 Gilma, and Smith was hiding behind houses on the opposite side of the street. The attempted murder instruction made clear that, in order to be guilty of Smith's attempted murder, Steven had to have the intent to kill Smith and not just Tiyani. We do not think there is any reasonable possibility that, as Steven suggests, the jury concluded Steven was guilty of the attempted murder of Smith based on shots fired in the opposite direction from where Smith was hiding. " 'We credit jurors with intelligence and common sense [citation] and do not assume that these virtues will abandon them when presented with a court's instructions. [Citations.]' [Citation.] [¶] We ask whether a 'reasonable juror would apply the instruction in the manner suggested by defendant.' [Citation.]" (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1396.) The trial court did not err.

G. *Cumulative Error*

Finally, Steven argues that the cumulative effect of the trial court's errors require reversal of the judgment. We have largely rejected Steven's arguments on the merits. Any errors that we have identified or assumed, for the sake of argument, were harmless, whether considered individually or collectively. Steven was entitled to a trial "in which [their] guilt or innocence was fairly adjudicated." (*People v. Hill, supra*, 17 Cal.4th at p. 844.) He received such a trial.

III. DISPOSITION

The judgment is affirmed.

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Bruiniers, J.

We concur:

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Jones, P. J.

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Simons, J.